



**Kamau & another v Kenya Railways Corporation & 2 others (Environment & Land Case 23 of 2022) [2023] KEELC 520 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 520 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 23 OF 2022  
FM NJOROGE, J  
FEBRUARY 2, 2023**

**BETWEEN**

**CHRISTOPHER KANAI KAMAU ..... 1<sup>ST</sup> PLAINTIFF**

**MARY WANGARI KANAI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> DEFENDANT**

**CHINA COMMUNICATION CONSTRUCTION COMPANY . 2<sup>ND</sup> DEFENDANT**

**KENYA POWER & LIGHTING COMPANY ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of the 1<sup>st</sup> defendant's notice of motion dated June 21, 2022 which seeks the following orders:
  - a. That this honourable court be pleased to strike out the name of the 1<sup>st</sup> defendant in this suit
  - b. That this honourable court be pleased to dismiss the suit against the 1<sup>st</sup> defendant.
  - c. That the costs of this application be granted to the 1<sup>st</sup> defendant/applicant
2. The application is supported by the affidavit sworn by Christine Macharia the senior legal officer of the 1<sup>st</sup> defendant. She deposed that the suit does not disclose any cause of action against the 1<sup>st</sup> defendant and the court ought to strike out its name; that the 1<sup>st</sup> defendant is not a privy to or aware of any relationship between the contractors of the high voltage power line and the proprietors of land known as Longonot/kijabe Block 6/811 and longonot/kijabe block 6/812; that the connection and management of high voltage power lines is not within the 1<sup>st</sup> defendant's mandate; that it does not exercise any control over the contractors of the power lines in question and cannot be held vicariously liable for actions of the said contractors; that the alleged trespass in the suit properties occurred in 2019



hence the suit would be time barred against the 1<sup>st</sup> defendant as per section 87 of the [Kenya Railways Corporation Act](#); that the suit against the 1<sup>st</sup> defendant be struck off with costs since there is no cause of action against it.

## Response

3. The plaintiffs filed their replying affidavit dated August 30, 2022 sworn by Christopher Kanai Kamau the 1<sup>st</sup> plaintiff/respondent herein. he deposed that the 1<sup>st</sup> defendant's application is misguided and grounded on misinterpretation of the law. He deposed that the plaintiffs' claim against the defendants is for trespass and subsequent continued violation of the plaintiffs constitutional proprietary rights by the arbitrary construction and/or connection of the high voltage power lines and electricity equipment in the suit lands.
4. He stated that the said trespass was expressly acknowledged by the 3<sup>rd</sup> defendant vide a letter dated November 12, 2021 which stated that the power line is a private line done by the standard gauge railway contractor. He added that the standard gauge railway was built by the 1<sup>st</sup> defendant in the discharge of its mandate.
5. The plaintiff deposed that the 1<sup>st</sup> defendant was actively involved in the construction, erection and connection of the high voltage power lines and other electricity equipment in the suit parcels. He further deposed that it would be fatal and prejudicial to the suit for the court to conclude at this juncture that the suit does not disclose any cause of action against the 1<sup>st</sup> defendant. He deposed that the 1<sup>st</sup> defendant admitted that the said construction of the high voltage power lines is not within its core mandate and further as advised by his advocates that section 87 of the [Kenya Railways Corporation Act](#) does not apply to the proceedings herein.
6. He stated that as further advised by his advocates the said section cannot be used to override a right and/or remedy granted by the constitution. In conclusion, he urged the court to dismiss the instant application to allow them ventilate their case.
7. The 3<sup>rd</sup> defendant also filed its grounds of opposition dated January 20, 2023 on the following grounds:
  1. That the 1<sup>st</sup> defendant is a necessary party in the proceedings to enable the court understand the correlation between the subject matter of the dispute and the statutory mandate of the 1<sup>st</sup> defendant of coordinating and integrating a system of rail and inland waterway services, related port services and connected auxiliary road services.
  2. That the 1<sup>st</sup> defendant is a necessary party in the proceedings in demonstrating the existence of reasonable and probable cause against it.
  3. That section 13 (2) (b) (c) of the [Kenya Railways Corporation Act](#) provides the powers of the Corporation as a statutory body.
  4. That the application is otherwise incompetent misconceived and is an abuse of the process of this honourable court and the same ought to be dismissed with costs.

## Submissions

8. The 1<sup>st</sup> defendant/applicant filed its submissions dated October 26, 2022 on October 27, 2022 where it gave brief facts of the case and identified two issues for determination. The first issue being whether a cause of action subsists against the 1<sup>st</sup> defendant. It relied on section 8 of the [Kenya Railways Corporation Act](#) which provides that its Board has a duty to provide a co-coordinated and integrated system within Kenya of rail and inland waterway transport services, port facilities in relation to inland



waterways transport services and auxiliary road services connection. It submitted that the mandate for the placement and management of infrastructure dealing with electricity generation and its transit is placed within the interdependent jurisdiction between the 3<sup>rd</sup> defendant and Ketraco under the Energy Act.

9. It relied on the case of *Elijah Sikona & George Pariken Narok on Behalf of Trusted Society of Human Rights Alliance v Mara Conservancy & 5 others* [2014] eKLR on striking out and submitted that from the plaintiffs' pleadings, the location of the 1<sup>st</sup> defendant in the contextualization of the alleged breach specifically the aspect of electricity generation is improbable as its mandate would not grant it the capacity to do so. It added that the cause herein contains multiple inconsistencies that render the maintenance of the 1<sup>st</sup> defendant in the suit untenable. The 1<sup>st</sup> defendant cited the case of *Robert Ngairu Kaniaru and 2 others v Wilson Macharia Rukwaro* [2016] eKLR and submitted that the pleadings do not reveal how the 1<sup>st</sup> defendant was actively involved in the construction and connection of the power lines.
10. The second issue identified by the 1<sup>st</sup> defendant for determination is whether the suit is time barred. The 1<sup>st</sup> defendant relied on section 87 (b) of the *Kenya Railways Corporation Act* and the Court of Appeal case of *Joseph Nyamamba & 4 others v Kenya Railways Corporation* [2015] eKLR. It submitted that the plaintiffs aver that the alleged encroachment occurred in the year 2019 while the suit has been filed in May 2022. The 1<sup>st</sup> defendant therefore maintains that the suit falls within the scope of Section 87 of the said Act and therefore statute barred.
11. It submitted that the limiting scope of section 87 of the *Kenya Railways Corporation Act* extends to all claims made against it for acts done in pursuit of its public duty. In conclusion it urged the court to strike out the 1<sup>st</sup> defendant from the instant suit with costs.

### **Analysis And Determination**

12. This court has considered the Application, and the main issue for determination is whether the 1<sup>st</sup> defendant is a necessary party in this suit for the issues raised to be determined with finality.
13. Order 2 Rule 15 of the *Civil Procedure Rules, 2010* permits a party to apply for striking out of pleadings and provides as follows:-
14. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
  - “(a) It discloses no reasonable cause of action or defence in law; or
  - (b) It is scandalous, frivolous or vexatious; or
  - (c) It may prejudice, embarrass or delay the fair trial of the action; or
  - (d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”
15. The 1<sup>st</sup> defendant seeks this court to strike out its name from this suit for the reason that it does not disclose any cause of action against it. It argues that the connection and management of high voltage power lines is not within its mandate and therefore the act of trespass by the 1<sup>st</sup> defendant as alleged by the plaintiffs is not true.
16. The plaintiffs on the other hand argued that it would be fatal and prejudicial to the suit for the court to conclude at this juncture that the suit does not disclose any cause of action against the 1<sup>st</sup> defendant.



The 3<sup>rd</sup> defendant in its grounds of opposition stated that the 1<sup>st</sup> defendant is a necessary party in the proceedings in demonstrating the existence of reasonable and probable cause against it.

17. This court has carefully considered the pleadings filed and a closer look at the Plaint dated May 4, 2022, the same shows the nexus of the 1<sup>st</sup> defendant in the eyes of the plaintiffs hence the cause of action. The documents annexed to the plaintiffs list of documents include a copy of letter from the plaintiffs addressed to Kenya Power & Lighting Company dated September 9, 2021, reply to the said letter by Kenya Power indicating that the power line in question is a private line done by the Standard Gauge Railway contractor. The plaintiff also annexed a demand letter dated November 12, 2021 addressed to the 1<sup>st</sup> defendant to which there was no response. The 3<sup>rd</sup> defendant's statement of defence dated May 20, 2022 also apportions blame of trespass to the 1<sup>st</sup> defendant alleging that the power lines were not constructed by them but by the 1<sup>st</sup> defendant.
18. It is this court's view that the above goes to show that the 1<sup>st</sup> defendant is indeed a necessary party to this suit and its presence would enable the court make a just finding. Furthermore, the Plaint raises triable issues worthy of trial by this court and it is therefore necessary that the 1<sup>st</sup> defendant exonerates itself from the letter by the 3<sup>rd</sup> defendant dated November 12, 2021 which can only happen during trial.
19. In view of the forgoing, the 1<sup>st</sup> defendant's application dated June 21, 2022 is dismissed with costs. Parties shall comply with order 11 of the [Civil Procedure Rules](#) and attend a mention for pre-trial on February 27, 2023.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

